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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION**

INDIGENOUS ENVIRONMENTAL
NETWORK and NORTH COAST
RIVER ALLIANCE,

and

NORTHERN PLAINS RESOURCE
COUNCIL, et al.,

Plaintiffs,

v.

UNITED STATES DEPARTMENT
OF STATE, et al.,

Defendants,

TRANSCANADA KEYSTONE
PIPELINE and TRANSCANADA
CORPORATION,

Defendant-Intervenors.

CV 17-29-GF-BMM

CV 17-31-GF-BMM

**Northern Plains Plaintiffs'
Statement of Position on
TransCanada's Motion to
Amend the Court's Order on
Summary Judgment**

Introduction

Plaintiffs Northern Plains Resource Council, et. al. (“Northern Plains Plaintiffs”) file this statement of position on TransCanada’s Motion to Amend the Court’s Order on Summary Judgment (the “Motion”), ECF No. 215. As TransCanada’s Motion indicates, Northern Plains Plaintiffs declined to take a position on the Motion until having an opportunity to review it. Northern Plains Plaintiffs now provide this statement to inform the Court of their position on the Motion in advance of the November 28, 2018 status conference; however, the Northern Plains Plaintiffs still intend to file a full response to the Motion within the applicable deadline.

Statement of Position

Northern Plains Plaintiffs do not oppose TransCanada’s Motion insofar as it would apply to the activities described in paragraphs 16-17 of the Ramsay Declaration, ECF No. 216-1. These activities include:

1. Project engineering;
2. Planning and related office work;
3. Submitting reports and other administrative actions required to remain in compliance with valid state and local permits;
4. Engaging with external parties in areas such as:
 - i. Confirming shipper contracts;

- ii. Pursuing remaining outstanding permits;
- iii. Interfacing with landowners and acquiring necessary land rights;
- iv. Acquiring pipe, materials and equipment, and other long lead time items;
- v. Inspecting and refurbishing work force camp modules, pipe, and associated materials and equipment previously purchased;
- vi. Engaging with communities, including indigenous communities, as well as federal, state, and local governmental entities, agencies, and other stakeholders;
- vii. Hiring additional project staff;
- viii. Soliciting, engaging, and contracting with potential construction contractors, specialty service providers and suppliers;
- ix. Other non-construction, non-destructive planning activities.

The Court's Order, ECF No. 218, appears to have contemplated at least some of these activities since it ordered the U.S. State Department to supplement the 2014 Environmental Impact Statement. However, by making any investments or expenditures toward the Keystone XL project prior to receiving all necessary permits and approvals (including but not limited to those required by the U.S. State Department, U.S. Army Corps of Engineers, and U.S. Bureau of Land Management), TransCanada assumes the risk that those permits will be denied, and thus any financial injury TransCanada may suffer as a result of those investments would be self-inflicted harm. *See Sierra Club v. U.S. Army Corps of Eng'rs*, 645

F.3d 978, 997 (8th Cir. 2011) (finding financial injury was “self inflicted” because parties who “jump the gun” or “anticipate[] a pro forma result” in permitting applications become “largely responsible for their own harm” (quoting *Davis v. Mineta*, 302 F.3d 1104, 1116 (10th Cir. 2002), abrogated on other grounds)).

Northern Plains Plaintiffs oppose the Motion insofar as it would apply to any field activities described in paragraph 18 of the Ramsay Declaration, ECF No. 216-1. Commencing those activities prior to agency decisions would violate the prohibitions of the National Environmental Policy Act and Endangered Species Act. Northern Plains Plaintiffs intend to file a response to the Motion within the deadlines imposed by Local Civil Rule 7.1(d)(1)(B)(ii), and have filed an Unopposed Motion for Extension of Time to Respond to Defendant-Intervenors’ Motion to Amend the Court’s Order on Summary Judgment, ECF No. 220, requesting that their response deadline be extended from December 4 to December 7, 2018.

Respectfully submitted,

Dated: November 27, 2018

/s/ Doug Hayes

Doug Hayes (*pro hac vice*)

/s/ Eric Huber

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CERTIFICATE OF SERVICE

I certify that I served the foregoing brief on all counsel of record via the Court's CM/ECF system.

/s/ Cecilia D. Segal